

**SUPREME COURT  
OF THE UNITED STATES**

No. \_\_\_\_\_

October Term, 1979

**79-692**

Supreme Court, U. S.

**FILED**

DEC 19 1979

MICHAEL RODAK, JR., CLERK

**HENRY SCHWARTZE, et al.**

**Petitioners**

**vs.**

**EMIL WENZ, et al.,**

**Respondents**

**APPENDIX "B"**

**PETITION FOR WRIT OF CERTIORARI  
TO THE**

**SUPREME COURT OF MONTANA**

**Decision: August 1, 1979**

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**APPENDIX "B"**

**No. 8828  
IN THE DISTRICT COURT OF THE  
NINTH JUDICIAL DISTRICT OF THE  
STATE OF MONTANA,  
IN AND FOR THE COUNTY OF PONDERA**

EMIL WENZ, et al.,

Plaintiffs,

vs.

DIANE SCHWARTZE, et al.,

Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT AND ORDER**

This cause having come on regularly for trial commencing on the 17th day of August, 1977, and the Plaintiffs all appearing in person, and through their Attorneys, Marra, Wenz, Iwen & Johnson, and the Defendant, Henry Schwartze, appearing in person, and through his Attorneys, Smith, Emmons, Baillie & Walsh, and the Court having heard testimony and taken proof necessary to enable it to render judgment herein, and the default of the Defendants, Diane Schwartze, and Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, having been duly and properly made and entered herein on the 8th day of November, 1977, and the Court being fully advised in the premises hereby makes the following:

## FINDINGS OF FACT

### I.

The Plaintiffs, Emil Wenz and Irene Wenz, husband and wife, who reside in Billings, Montana, are the parents of the Plaintiff, Linda Holden and of the Defendant, Diane Schwartz.

### II.

The Plaintiffs, John L. Holden and Linda Holden, husband and wife, reside on a ranch in Pondera County, Montana with their four (4) children, namely, Laura, age thirteen (13); Jack, age eleven (11); David, age nine (9); Janell, age six (6) months, and Alexandra Schwartz, age eight (8) years, who has resided with them and has been treated as one of their own children since May 17, 1975.

### III.

The Defendants Henry Schwartz and Diane Schwartz were married June 12, 1966. Alexandra Schwartz was born of their marriage on June 20, 1969.

### IV.

Diane Schwartz commenced an action for divorce and for the custody of Alexandra Schwartz against Henry Schwartz in the Superior Court of the State of California, County of Los Angeles, hereinafter referred to as the California Court. The action was not contested by Henry Schwartz and a final decree granting Diane Schwartz a divorce and granting the custody of Alexandra Schwartz to her was entered in the California Court on June 13, 1972, subsequent to the entry of an Interlocutory Decree of Divorce dated August 3, 1971.

### V.

The California Court ordered Henry Schwartz to pay \$25.00 per week for the support of his daughter Alexandra Schwartz commencing July, 1971. Henry Schwartz executed a declaration of financial statement under penalty of perjury in the California divorce proceeding which was false in that it placed a value of One Thousand Dollars (\$1,000.00) on property he owned by inheritance since 1960, which had been appraised at Fifty Four Thousand Four Hundred Dollars (\$54,400.00) in 1960 and which was sold by Henry Schwartz for One Hundred Eight Thousand Dollars (\$108,000.00) in August, 1973.

### VI.

The records and files of the California Court show that Henry Schwartz failed and neglected to provide support for his minor daughter. The payment history report of the California Court Trustee (Exhibit 35) shows that Henry Schwartz paid only Thirty Dollars (\$30.00) toward the support of his daughter Alexandra from July 1971, to January, 1973, at which time an Order to Show Cause why he should not be held in contempt for failure to support was issued by the California Court.

### VII.

Henry Schwartz obtained counsel to represent him in the California contempt proceeding and as a result of Henry Schwartz's misrepresentations to Diane Schwartz and the California Court, his child support payments were reduced to Sixty-Six Dollars (\$66.00) a month com-



mencing December 1, 1973. The evidence discloses Henry Schwartze had received Ninety-Nine Thousand Four Hundred Dollars (\$99,400.00) in cash on August 30, 1973, from the sale of some of the real estate which he had owned since 1960, by inheritance.

#### VIII.

Henry Schwartze did not pay the reduced support payments and the California Court issued a second Order to Show Cause why he should not be held in contempt for failure to pay child support in February, 1975.

#### IX.

From August, 1973, to the present time, Henry Schwartze used said Ninety-Nine Thousand Four Hundred Dollars (\$99,400.00) for the purpose of purchasing a house for which he testified he paid Thirty-Eight Thousand (\$38,000.00) or Thirty-Nine Thousand Dollars (\$39,000.00); to refurbish said house and to support himself. The tax returns from 1969 through 1976 disclose that Henry Schwartze who declared himself to be employed as a musician and photographer in said income tax returns has, in fact, done very little in the nature of serious employment. His 1976 tax return, for example, shows that he sustained a Two Thousand Two Hundred Sixty-Two Dollar (\$2,262.00) loss in his photography business from gross sales of Two Thousand Three Hundred Twenty-Nine Dollars (\$2,329.00). The tax returns further show that he earned One Thousand Four Hundred Eighty-Eight Dollars (\$1,488.00) in the 2 year period from 1969 through 1970; Eight Hundred Thirty-One Dollars (\$831.00) in

1971; Three Thousand Eight Hundred Seventy-Four Dollars (\$3,874.00) in 1972, jointly with his present wife; Twenty-One Thousand Nine Hundred Eighty Dollars (\$21,980.00) in 1973, jointly that income having been derived principally from the sale of his inherited land; Three Thousand Five Hundred Five and 75/100 Dollars (\$3,505.75) jointly in 1974; One Thousand Four Hundred Twenty-Eight and 28/100 Dollars (\$1,428.28) jointly in 1975, and One Thousand Ninety Dollars (\$1,090.00) jointly in 1976.

#### X.

Prior to the divorce instituted by Diane Schwartze, Henry Schwartze knew that she was living with the Defendant, Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, to whom she was not married; that they were using drugs; that Diane Schwartze appeared to be mentally ill, but Henry Schwartze made no appearance in the divorce and custody action for the purpose of attempting to obtain the custody of his daughter, Alexandra Schwartze.

#### XI.

Since at least February of 1974, Henry Schwartze knew that his daughter, Alexandra Schwartze, not yet five (5) years old, had reported to his mother, Fannie Boller, and later admitted to him, that she had been sexually molested by the Defendant, Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, the man who was living with her mother.

Henry Schwartze knew that Diane Schwartze and the man with whom she was living were using marijuana; that his daughter not yet five (5) had reported witnessing their taking hypodermic injections from third persons.

Henry Schwartz knew of the poverty and the filthy living conditions his daughter had to endure in addition to the sexual immorality and abuse she was subjected to, and he neither contributed the minimal support required by the California Decree nor commenced any proceedings to obtain the custody of his daughter.

Henry Schwartz knew that Diane Schwartz and his child were on the California welfare rolls.

XII.

In May of 1975, Diane Schwartz delivered the physical custody of Alexandra Schwartz to Fannie M. Boller, mother of Henry Schwartz. Diane Schwartz advised Fannie M. Boller at that time that Alexandra Schwartz would no longer be permitted to live with her and the man with whom she was living. From May of 1975 until June 17, 1975, Alexandra Schwartz remained in the physical custody of Fannie M. Boller, who on June 17, 1975, left Alexandra Schwartz with the Plaintiffs, John L. Holden and Linda Holden, at their home on a ranch in Pondera County, Montana, with a letter which states in part "This is a plea to anyone and everyone concerned to do something to save my granddaughter from any further association with the people her mother, Diane Schwartz, lives with and associates with", outlining and stating further in detail that for three (3) years she was aware from Alexandra's statements to her of the sexual abuse she had been subjected to and the filthy conditions and neglect which Alexandra had been compelled to endure.

XIII.

On June 20, 1975, the Plaintiffs, who are as hereinbefore stated, the maternal grandfather and grandmother and the aunt and uncle of Alexandra Schwartz, commenced these proceedings, and the Honorable Ronald L. McPhillips, the District Judge then presiding, made an Order herein awarding the care, custody and control of Alexandra Schwartz to the Plaintiffs, John L. Holden and Linda Holden, during the pendency of these proceedings, which Order has continued in full force and effect until this day.

XIV.

This Court has jurisdiction over the person of Alexandra Schwartz by virtue of the fact that she was physically and lawfully within the jurisdiction of this Court at the time of the commencement of this action and the Plaintiffs are proper parties to commence this proceeding under and by virtue of the provisions of Section 61-111, R.C.M. 1947.

XV.

This Court finds the testimony of the Defendant Henry Schwartz incredible, that he doubted that his daughter, Alexandra Schwartz, a child of five (5) or six (6) years of age, was telling the truth when she described in detail the unnatural sexual acts which she had been compelled to endure and perform.

XVI.

Henry Schwartz did not institute any proceeding in the State of California for the purpose of obtaining the



custody of Alexandra Schwartz until she was outside of the State of California and in the State of Montana, and after having been informed that the Plaintiffs herein were going to commence this action.

XVII.

The Order awarding temporary custody to the Plaintiffs John L. Holden and Linda Holden pending this hearing was obtained on June 20, 1975, and the Order awarding custody to Henry Schwartz obtained by Stipulation between Diane Schwartz and Henry Schwartz in the California Court was obtained July 7, 1975.

XVIII.

There is evidence that Henry Schwartz talked to an attorney Jerome A. Kessler, in February of 1974, about the possibility of obtaining custody of Alexandra Schwartz; Linn Davis, Mr. Kessler's legal researcher, who has a Juris Doctor degree, testified that Henry Schwartz first brought the subject up in March of 1975. There are, however, no writings, memoranda or other documentation of these conferences although some of Mr. Kessler's records and files relative to this matter have been submitted to the Court and contain detailed notes. There is also evidence in the record that the Defendant Henry Schwartz discussed the matter with Max H. Gewirtz as a result of the urging of his mother, Fannie M. Boller, in May of 1975. The sum and substance of these conferences, however, is that the advice which Henry Schwartz had been given is that the child custody issue would be difficult; traumatic for his child and that Henry

Schwartz did not, in fact, make up his mind to commence any proceedings for the purpose of obtaining custody of his daughter until he knew this proceeding was going to be filed, although there was no change in circumstance, and Henry Schwartz relied almost solely upon the sexual abuse issue which he was aware of since at least February of 1974.

XIX.

This Court finds it incredible that anyone should be of the opinion that the California Court prior to June 19, 1975 would have doubted the testimony of Alexandra Schwartz, a child of five (5) or six (6) years of age, explicitly describing unnatural sex acts which she had been compelled to perform and endure.

XX.

The conduct of the Defendants Henry Schwartz and Diane Schwartz as found herein, constitutes an abuse of parental authority rendering them unfit to have or to regain the care, custody and control of their minor child, Alexandra Schwartz.

XXI.

During the more than two (2) years that Alexandra Schwartz has resided with her aunt and uncle, the Plaintiffs, John L. Holden and Linda L. Holden, and their family, she has become and has been treated as a member of that family; she has changed from a hyperactive, nervous and anxious child to a well-adjusted child, comfortable and secure in her present environment.

**XXII.**

This Court agrees with the expert opinion of Edward L. Shubat, PHD., the Clinical Psychologist associated with the Great Falls Clinic of Great Falls, Montana, who has observed the child both at the commencement of the two-year period and two days before the trial of this matter, that Alexandra's adjustment referred to in the previous paragraph, testified to by Dr. Shubat and corroborated by other witnesses, has clearly occurred and this Court further agrees with the opinion of said clinical psychologist that the best interests of Alexandra Schwartz will be served if she is allowed to remain with the Plaintiffs, John L. Holden and Linda L. Holden. It is uncontroverted that the Plaintiffs John L. Holden and Linda L. Holden, are fit and proper persons to be awarded the permanent care, custody and control of Alexandra Schwartz.

**XXIII.**

The conduct of the Defendant Henry Schwartz constitutes an abandonment of Alexandra Schwartz and an abuse of his parental authority. This Court is of the opinion that the belated attempts of the Defendant Henry Schwartz to obtain custody of Alexandra Schwartz are prompted principally by the urgings of his mother, Fannie M. Boller.

**XXIV.**

A viable parent-child relationship has never really existed between the Defendant Henry Schwartz and his daughter Alexandra Schwartz, and there is complete estrangement between them at this time. Further, the fitness of the home of the Defendant, Henry Schwartz,

who admittedly has a drinking problem, and his present wife, Carol, who oftentimes travels as a musician and with whom Alexandra has developed no parent-child relationship, is extremely questionable.

**FROM THE FOREGOING FINDINGS OF FACT,  
THE COURT MAKES THE FOLLOWING:**

**CONCLUSIONS OF LAW**

**I.**

That the conduct of the Defendants Diane Schwartz and Henry Schwartz during the lifetime of their minor child, Alexandra Schwartz, constitutes an abuse of parental authority requiring a forfeiture and waiver of any right whatsoever which they may have had to the care, custody and control of said minor child.

**II**

That said conduct was such as to constitute an abandonment of said minor child arising from their failure to perform the duties and obligations originating from the legal dominion which the law gives to natural parents.

**III.**

That the conduct was such as to render the Defendants Diane Schwartz and Henry Schwartz unfit to have or to regain the care, custody and control of the minor child Alexandra Schwartz.

**IV.**

That the best interests of the minor child Alexandra Schwartz in respect to her temporal, mental and moral welfare requires that the said Alexandra Schwartz must be free from the dominion of the Defendants Diane Schwartz and Henry Schwartz.

V.

That the best interests of Alexandra Schwartz include the protection of her health and welfare require that she be free from the dominion of her natural mother and father, Diane Schwartz and Henry Schwartz, and require that the full and complete care, custody and control of Alexandra Schwartz be awarded to her aunt and uncle, the Plaintiffs herein, John L. Holden and Linda L. Holden.

WHEREFORE, upon due consideration of the law and of the evidence presented,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the minor child, Alexandra Schwartz, be and she is hereby freed from the dominion and control of the Defendants, Diane Schwartz and Henry Schwartz, or either of them, from and after the date hereof.

2. That the Plaintiffs, John L. Holden and Linda L. Holden, are fit and proper persons to have the care, custody and control of the aforesaid minor child, and they are hereby awarded the permanent care, custody and control of the minor child, Alexandra Schwartz.

3. That the authority of the Defendants, Henry Schwartz and Diane Schwartz, a/k/a Diane Schwartz Leonard, the natural parents of said Alexandra Schwartz, does hereby cease, and the Plaintiffs, John L. Holden and Linda L. Holden, uncle and aunt of said Alexandra Schwartz, are hereby invested with all of the powers and they shall have all of the responsibilities of a parent toward said

Alexandra Schwartz, a minor, and said John L. Holden and Linda L. Holden may be and they are hereby appointed general guardians of said Alexandra Schwartz for the duration of her minority, without further notice in that this Court finds that the parties and all other interested persons have had adequate notice and the opportunity to be heard herein.

DATED this 28 day of November, 1977.

s/JOEL G. ROTH

District Judge



## PROOF OF SERVICE

State of California )

ss

County of Riverside )

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action; My business address is 1509 N. Main, Santa Ana, California 92701.

I served the within

### APPENDIX "B"

#### PETITION FOR WRIT OF CERTIORARI

on the

interested parties in said action, by placing a true copy in each of five sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

#### APPEARANCES:

Marra, Wenz, Iwen & Johnson  
414 Davidson Building  
Great Falls, Montana 59401  
(Attorneys for Respondents  
at Trial Level)

Smith, Emmons, Baillie & Walsh  
402 Strain Building  
Great Falls, Montana  
(Attorneys for Petitioner  
at Trial Level)

Cascade County Attorney's Office  
Carroll C. Blend, Deputy Attorney  
Cascade County Courthouse  
Great Falls, Montana 59401  
(Attorney for Alexandra Schwartze)

Hon. Joel G. Roth  
9th Judicial District Court  
Great Falls, Montana

Supreme Court of Montana  
Office of Clerk  
Helena Montana

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on 1979 at Santa Ana, California.

JACK GALLAGHER